

Workgroup #3 Blueprint for Dealing with Fiduciary/Attorney Fee Issues

Disclaimer: this blueprint was prepared by the current chair of Workgroup #3 in an effort to provide a general report to the Committee, concerning the effort of Workgroup #3 to fulfill its mandate; time constraints did not allow this blueprint to be vetted by the Workgroup, such that this blueprint may not reflect the consensus or majority position of Workgroup #3.

- **TRANSPARENCY ON FEES:** Prior to the time of appointment in any Title 14 proceeding, any fiduciary intending to be paid shall disclose the basis for their fees (e.g., rate schedule) to the Presiding Judge of each county where they appear or accept appointments [or some other identified method of disclosure], who shall make the information available for the public and practitioners, and the basis of their fees shall not be changed for any new appointments on less than TBD days notice. *Current discussion points: how do fees change following an appointment; does this disclosure requirement apply to the fiduciary's attorney, any other appointed attorney(s), and/or a guardian ad litem?*
- **LOYALTY OF COUNSEL:** Prohibit the appointment or continued appointment of a guardian *ad litem* or attorney for the proposed ward or protected person, if that person has an existing attorney-client relationship with the nominated or appointed fiduciary, and prohibit a fiduciary from recommending or nominating the appointment of a guardian *ad litem* or attorney for the proposed ward or protected person.
- **PREDICTABILITY OF COSTS:** Except for unsupervised decedent's estates and unsupervised trusts, fiduciaries shall submit an annual operating budget, which shall include line-items for any compensation or reimbursement for fiduciaries and attorneys. The proposed first year budget shall be submitted no later than the time for the filing of an inventory, and the proposed budget for any subsequent year shall be submitted no later than the deadline for the annual report; a proposed budget shall list the general categories of income and expense. The fiduciary must promptly report to the court, attorneys, and any interest parties when any category is projected to deviate more than TBD% from the approved budget. When considering the annual accounting of the fiduciary, the court shall place the burden on the fiduciary to show good cause for deviating from the approved budget [or some percent over the approved budget], but expenditures that are consistent with the budget shall be presumed reasonable and necessary. *Current discussion points: how is predictability of fees created in the case of an emergency appointment or prior to the first year budget; does an "approved budget" require prior court approval or is it deemed approved absent a timely objection?*
- **MARKET FORCES:** Market forces are a proper component of any compensation framework, which the court should weigh in determining the best interests of an incapacitated person. *Current discussion points: how can market forces best be utilized to protect an incapacitated person's best interests; if an interested person objects to a proposed budget, might an alternative proposed budget be submitted for the court's*

consideration, including if appropriate a petition for the appointment of an alternative fiduciary; following timely notice of a prospective budget, should any objection that is not made prior to the approval of a budget be waived.

- FEE GUIDELINES: Establish guidelines to help court and parties assess whether fiduciary and attorney fees are reasonable. Guidelines are to be used as a reference point. The fiduciary fee guidelines will address some of the “hot” issues, such as whether a fiduciary may charge for clerical tasks and, if so, under what circumstances, so that fees and costs are comparable between fiduciaries and attorneys. *Current discussion points: in addition to the continuing effort to draft the guidelines, should the Workgroup recommend for or against any proposals to set or limit hourly rates, as well as any percentage-based mathematical models?*
- SUMMARY REPORT: Revise the current annual accounting forms with a summary report and supplemental schedules, which reflect the categories of income and expense that are included in the approved budget, including the actual operating results of the prior period, the budget and actual results for the period just ended (including a summary of any payables), the proposed budget for the period just beginning, and the projected income and expenses in the following period. Such a report will show trends, actual performance in relation to budgets, and assist with long-term planning. This summary report shall be supplemented by the inventory and a transaction log grouped by categories that correspond to the summary report, essentially reorganizing the information provided in the current annual accounting forms so it is more informative.
- APPLICATION DEADLINE: Establish a statute of limitations for requests to approve compensation by fiduciaries, attorneys, and guardians *ad litem*, including earned but unpaid fees. *Current discussion points: in what Title 14 proceedings should this apply; and should periodic billings to interested parties be required and if so, at what frequency?*
- FEE-SHIFTING: Enact general fee-shifting statute for unreasonable conduct.
- FIDUCIARY REMOVAL: Amend the fiduciary removal statutes so they are consistent in the standards for replacing a fiduciary regardless of the type of fiduciary. Change terminology from “remove” to “replace.” Allow court to replace a guardian or conservator if such removal is in the ward/protected person’s best interest (without requiring a showing of misfeasance or malfeasance).